No. 1131

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

PHIL RYAN,

Petitioner,

vs.

IONE CROSS, RUBY CROSS, AN INFANT, BY IONE CROSS, HER NEXT FRIEND, ET AL., ETC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUMMARY OF ARGUMENT:

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(1) The Statute (Sec. 135, Ch. 43, Ill. Rev. Stats. 1939) 14, 26

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(4) To rule that the actions brought by the plaintiffs herein are suits to vindicate a private right as was done by the United States Circuit Court of Appeals renders Section 135 of the Dram Shop Statute repugnant to Article IV, Section 13 of the Illinois Constitution in that the Statute as so construed has an independent subject which is incongruous, disconnected and without any natural relation to the object desired by the enactment of the whole Alcoholic Liquor Control Act 15, 32

(5) Whereas, if the Statute is construed to be penal it is constitutional. As so construed the private remedy given to the plaintiffs provided only the means by which the principal purpose and object of the statute may be accomplished; the damages sustained and recovered are incidental and are but the measurement of the amount of the penalty imposed

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IN THE

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OCTOBER TERM, A. D. 1941

No. .....

PHIL RYAN,

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vs.

ONE CROSS, RUBY CROSS, AN INFANT, BY IONE CROSS, HER NEXT FRIEND, ET AL., ETC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

o the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Phil Ryan, respecftully shows to this Honorable Court:

This is a petition for a Writ of Certiorari to the United tates Circuit Court of Appeals for the Seventh Circuit o review its decision and decree which adjudged, in part:

(1) That the suits brought by the plaintiffs herein nder the provisions of Sec. 135 of the Illinois Liquor Con-rol Act, commonly called the Dram Shop Statute, which is

set forth in *haec verba* in the attached brief and argument, (Chap. 43, Section 135, Illinois Revised Statutes 1939) are of a civil nature within the purview of the Judicial Code of the United States (28 U.S.C.A. Sec. 41) and, therefore, the United States District Court for the Eastern District of Illinois had jurisdiction to entertain such suits; and

(2) That the United States District Court for the Eastern District of Illinois was not in error in refusing to grant your petitioner's motion to dismiss and withdraw from the consideration of the jury, Counts I, IV, VII and X, and Counts III, VI, IX and XII of the amended complaint because each of such counts states a cause of action under the Illinois Dram Shop Statute and there was evidence adduced to support said counts.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A. In General.

These actions were brought in the District Court of the United States for the Eastern District of Illinois by a wife and three minor children to recover damages for loss of means of support under the so-called Dram Shop Act of Illinois (Chap. 43, Section 135, Illinois Revised Statutes, 1939), through the death of the husband and father. The jury returned four separate verdicts in which damages of $1,500.00 were awarded the plaintiff, Ione Cross, the wife, and damages of $1,000.00 was awarded to each of the other plaintiffs, the three minor children. The District Court entered judgments on these verdicts and the defendant perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit (R. 259, 260).

The errors relied upon on the appeal to the United States Circuit Court of Appeals arose out of the failure of the

District Court to dismiss the causes of action for want of jurisdiction; failure to dismiss the claim of Ione Cross; failure to dismiss Counts I, IV, VII and X; failure to dismiss Counts III, VI, IX and XII; failure to direct verdicts; failure to grant judgments notwithstanding the verdicts; and failure to grant the defendant a new trial.

B. Decision of the United States Circuit Court of Appeals.

The United States Circuit Court of Appeals on November 11, 1941 filed its opinion, by Honorable Sherman Minton, Circuit Judge, wherein and whereby the judgment of the United States District Court was affirmed (R. 282-287). Reported in 124 F. (2) 883. Thereafter on November 25, 1941, defendant filed his petition for a rehearing (R. 288), and on January 14, 1942, the United States Circuit Court of Appeals entered its decision and order denying defendant's petition for a rehearing (R. 288).

C. The Pleadings.

The case was tried on the amended complaint, (R. 12-21); answer to amended complaint (R. 25-32) and reply (R. 33-40).

The amended complaint, filed July 5, 1940, alleges:

COUNT I.

(1) That the plaintiff, Ione Cross, is a citizen of the State of Kentucky, residing in the City of Wickliff, Ballard County in said state; (2) that the defendant, Phil Ryan, is a citizen of the State of Illinois, residing in the City of Cairo, County of Alexander in said state; (3) that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000); (4) that in his lifetime George Cross was the husband of Ione

Cross and the father of Ruby Cross, Fredaline Cross and Fred Cross, the plaintiffs herein, and that they had no property or means of support during the lifetime of said George Cross except that provided by him; (5) that on April 9th and April 10th, 1938 the defendant, Phil Ryan, operated a tavern at 204 Commercial Avenue in the City of Cairo, Illinois, known as "The Turf" and in such business sold intoxicating liquors at retail; (6) that either on April 9th, 1938, near midnight, or on the morning of April 10th, 1938 immediately after midnight, or on both of said dates, the defendant, Phil Ryan, by his agent or servant, sold or gave intoxicating liquors to the said George Cross which intoxicating liquors were then and there consumed on the premises of the said Turf and caused, in whole or in part, the intoxication of the said George Cross; (7) that as a proximate result of said intoxication George Cross was injured by being assaulted, struck, beat and kicked by one George Stout by reason of the abusive conduct of the said George Cross, and as a direct and proximate result of his intoxication the said George Cross was unable to defend himself to avoid injury, and that as a result of said injury the said George Cross on, to-wit: the 10th day of April, 1938, died; (8) that as a result of the intoxication and death of the said George Cross, the plaintiff, Ione Cross was injured in the means of her support and deprived of the same and thereby sustained damages; (9) that a cause of action arose to said plaintiff under Section 135 of Chapter 43 of the Illinois Revised Statutes, being Section 14 of an Act entitled "Liquor Control Act" approved January 31, 1934, and this suit is brought upon said statute and under the rights conferred therein. WHEREFORE, the plaintiff, Ione Cross, asks judgment against the defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500) (R. 12-14).

COUNT II.

For a further cause of action against the defendant, Phil Ryan, the plaintiff, Ione Cross, here realleges all of the allegations contained in paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint as the same numbered paragraphs of this Count, and further says:

(6) That either on April 9th, 1938 near midnight or on the morning of April 10th, 1938, immediately after midnight, or on both of said dates, the defendant Phil Ryan, by his agent or servant, sold or gave intoxicating liquors to one George Stout, which intoxicating liquors were then and there consumed on the premises of the said Turf, and caused, in whole or in part, the intoxication of the said George Stout; (7) that as a proximate result of said intoxication George Stout assaulted the said George Cross and that in said assault the said George Cross was fatally injured and thereupon, to-wit, on April 10, 1938, died; (8) that as a result of the intoxication of the said George Stout, an altercation was brought on between the said George Stout and the said George Cross which said altercation caused the injury and death of the said George Cross and that as a result thereof, the plaintiff was injured in the means of her support and deprived of the same and thereby sustained damages; (9) plaintiff, Ione Cross, adopts paragraph 9 of Count I as the same numbered paragraph of this count. WHEREFORE, the plaintiff, Ione Cross, asks judgment against the defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500) (R. 14-15).

COUNT III.

For a further cause of action against the defendant, Phil Ryan, the plaintiff, Ione Cross, here realleges all of the allegations contained in paragraphs 1, 2, 3, 4 and 5 of

Count I of this complaint as the same numbered paragraphs of this Count, and further says:

(6) That either on April 9, 1938 near midnight, or on the morning of April 10, 1938, immediately after midnight, or on both of said dates, the defendant, Phil Ryan, by his agent or servant, sold or gave intoxicating liquors to both the said George Cross and the said George Stout, which intoxicating liquors were then and there consumed by them on the premises of the Turf and caused, in whole or in part, their intoxication; (7) that as a direct and proximate result of the intoxication of the said George Cross and the said George Stout, they became engaged in a drunken brawl and while so engaged the said George Stout struck, beat and kicked the said George Cross and thereby fatally injured him and from said injuries the said George Cross died on April 10, 1938; (8) that the death of the said George Cross injured the plaintiff, Ione Cross, in her means of support and deprived her of the same and she thereby sustained damages; (9) that a cause of action arose to said plaintiff under Section 135 of Chapter 43 of the Illinois Revised Statutes, being Section 14 of an Act entitled "Liquor Control Act" approved January 31, 1934, and this suit is brought upon said statute and under the rights conferred therein. WHEREFORE, the plaintiff, Ione Cross, asks judgment against the defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500) (R. 15-16).

Counts IV, V and VI are the same as Counts I, II and III and follow in respective order, except that Ruby Cross, an infant, by Ione Cross, her next friend, is plaintiff and demands $5,000.00 damages in each count (R. 16-17).

Counts VII, VIII and IX are the same as Counts I, II and III and follow in respective order, except that Fredaline Cross, an infant, by Ione Cross, her next friend, is plaintiff and demands $5,000.00 damages in each count (R. 17-19).

Counts X, XI and XII are the same as Counts I, II and III and follow in respective order, except that Fred Cross, an infant, by Ione Cross, his next friend, is plaintiff and demands $5,000.00 damages in each count (R. 19-21).

The defendant, Phil Ryan, on July 15, 1940, filed his amended motion to dismiss the action and to dismiss the amended complaint which, among other things, is as follows:

1. This Court does not have jurisdiction over the subject matter because the action is not a suit of a civil nature but is a suit of a penal nature.

2. The action was not commenced, either under the original complaint filed May 9, 1940, or under the amended complaint, filed July 2, 1940, within two years next after the death of George Cross which occurred on April 10, 1938.

3. No one of Counts I, IV, VII and X states a right of action under the statute relied upon by the respective plaintiffs because a sale to George Cross, husband and father, and the consumption of intoxicating liquors by said George Cross are not the direct and proximate cause of the injury to the plaintiffs' means of support.

4. No one of Counts III, VI, IX and XII states a right of action under the statute relied upon by the respective plaintiffs because a sale to George Cross, husband and father (and also a sale to George Stout) and the consumption of intoxicating liquors by said George Cross (and also the consumption of intoxicating liquors by said George Stout) are not the direct and proximate cause of the injury to the plaintiffs' means of support (R. 21-23).

This motion was overruled (R. 35) and the defendant on September 10, 1940, filed his answer to the second amended complaint in which he admitted that he was a citizen of the State of Illinois residing in Cairo, Alexander

County of said state; admitted that on April 9th and 10th, 1938, he operated the Turf tavern located at 204 Commercial Avenue, Cairo, Illinois; alleged that the cause of action of Ione Cross did not accrue to said plaintiff within two years next before the commencement of her action; alleged that the Court did not have jurisdiction to hear and determine the plaintiffs' causes of action under the Dram Shop statute as their causes of action were not of a civil nature; but of a highly penal character; alleged that if the deceased George Cross, was injured at the time and place in question it was because of the act and conduct of some other person or persons for whose act and conduct the defendant was in no manner responsible under the statute relied upon by the plaintiffs; the answer then denied or otherwise put in issue all of the remaining allegations of each count of the amended complaint (R. 25-32).

D. Conclusion.

Your petitioner respectfully represents that in said actions there is drawn in question the jurisdiction of the United States District Court for the Eastern District of Illinois to entertain said actions, on the ground that the same are not of a civil nature within the meaning of Sec. 24 of the Judicial Code of the United States (28 U.S.C.A. Sec. 41); and there is involved herein the question whether the United States District Court was not in error in refusing to grant your petitioner's motion to dismiss and withdraw from the consideration of the jury, Counts I, IV, VII and X, and Counts III, VI, IX and XII of the amended complaint on the ground that said counts do not state a cause of action and that there was no evidence introduced to support any of said counts.

Your petitioner further represents that the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit affirming a final judgment of the

court below was filed on January 14, 1942 (R. 288) and that this petition is filed within the time provided for making such petition, (28 U.S.C.A. Sec. 350), and your petitioner complains that in the record and proceedings had in said cause and in the rendition of the decision of the said United States Circuit Court of Appeals manifest error was committed, all of which in more detail will appear hereinafter in the brief filed herewith.

II.

BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT.

Petitioner contends that this Court has jurisdiction to issue Writ of Certiorari upon the following grounds:

(1) The Statute believed to sustain the jurisdiction of this Court to issue the Writ of Certiorari is Sub-section (a) of Section 240 of the Judicial Code of the United States as amended (28 U.S.C.A. Sec. 347), which empowers the Supreme Court of the United States by certiorari to require that there be certified to it for review and determination, either before or after a judgment or decree by such lower court, with the same power and authority, and with like effect as if the cause had been brought there by restricted writ of error or appeal.

III.

ERRORS SPECIFIED ON THE PETITION FOR WRIT OF CERTIORARI.

A. The United States Circuit Court of Appeals erred in finding and holding that the suits herein brought under the Illinois Dram Shop Statute (Ch. 43, Sec. 135, Illinois

Revised Stats. 1939) are of a civil nature within the meaning of the Judicial Code of the United States (28 U.S.C.A. Sec. 41) so as to confer jurisdiction upon the United States District Court for the Eastern District of Illinois to entertain such suits.

B. The Court erred in finding and holding that as a matter of law Counts I, IV, VII and X and Counts III, VI, IX and XII of the amended complaint stated causes of action under the Illinois Dram Shop statute.

C. The Court erred in finding and holding that there was competent evidence adduced to support Counts I, IV, VII and X, and the Counts III, VI, IX and XII of the amended complaint.

D. The Court erred in affirming the judgment of the United States District Court and in refusing to reverse said judgment with directions to dismiss the amended complaint or to reverse and remand the cause for a new trial.

IV.

ISSUES INVOLVED.

The issues presented by this petition are:

(1) Did the United States Circuit Court of Appeals construe and interpret Section 135 of the Illinois Dram Shop Act in a way that conflicts with the Constitution of Illinois and Illinois decisions?

(2) Has the United States District Court jurisdiction under Sec. 24 of the Judicial Code of the United States (28 U.S.C.A., Sec. 41) to entertain these suits which are brought under the Illinois Dram Shop Statute (Ch. 43, Sec. 135, Ill. Rev. Stats, 1939)?

(3) Do Counts I, IV, VII and X and Counts III, VI, IX and XII of the amended complaint state a cause of action under the Illinois Dram Shop Statute (Ch. 43, Sec. 135, Ill. Rev. Stats. 1939)?

(4) Was there any competent evidence adduced to support Counts I, IV, VII and X and Counts III, VI, IX and XII of the amended complaint?

V.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 282-287) holding that an action brought under Section 135 of the Illinois Dram Shop Act is a suit of a "*civil nature*", within 28 U.S.C.A., Sec. 41, and not an action to recover a penalty under a penal statute, renders said Section 135 unconstitutional and void as being in conflict with Article IV, Section 13 of the Illinois Constitution of 1870, for the reason that Section 135 as construed by the United States Circuit Court of Appeals embraces more than one subject not expressed in the title of the Act and is, because of that fact, inconsistent with and not germane to the principal object of the Act which is to regulate and control the manufacture, sale and distribution of alcoholic liquors and to *punish* those who furnish means of intoxication by making them liable for a penalty in the form of damages which might arise through and by the acts of those persons whose intoxication was caused by such means. The action given by Section 135 of the Act can only be justified as being constitutional by virtue of the police power of the State of Illinois which power, in order to be legitimately exercised, must have for its object the preservation of the *public* health, safety, morals or general welfare (*Eiger*

v. *Garrity,* 246 U. S. 97, 102, 62 L. Ed. 596, 599); such action is not and cannot be *"essentially a suit to vindicate a private right"* (Opinion, C.C.A. R. 284).

Penal statutes under Illinois law are those by which punishments are imposed for transgressions thereof and it matters not that the suit instituted to recover the penalty provided thereunder *"is brought in an individual plaintiff's name"* or *"is exclusively under the control of the plaintiff"* or that *"the recovery inures to the exclusive benefit of the plaintiff"* (Opinion C.C.A. R. 285). The edicts of *Huntington* v. *Attrill,* 146 U. S. 657, 667-676, which express a contrary view, and on which the United States Circuit Court of Appeals relied, (Opinion C.C.A. R. 285) have been specifically rejected and disapproved by the Supreme Court of Illinois in *Raisor* v. *C. & A. R. R. Co.,* 215 Ill. 47, 55-56.

Since the State of Illinois in the Dram Shop Act has enacted and advanced an important public policy in dealing with the sale and distribution of alcoholic liquors, it is for Illinois to say whether Section 135 of that Act is penal or non-penal, in the light of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 and *Griffin* v. *McCoach,* 313 U. S. 498, so as to foster and encourage uniformity in the administration of justice in "State and Federal courts sitting side by side".

The amended complaint, upon which these cases were tried, consisted of twelve counts, eight of which did not state a cause of action under Section 135 of the Dram Shop Act and were unsupported by evidence. Under said Section 135, intoxication without injury proximately caused therefrom gives no cause of action. *Shugart* v. *Egan,* 83 Ill. 56 and *Sauter* v. *Anderson,* 112 Ill. App. 580, 584. Timely motions were made before and at the trial in order to preserve these points for review. The rule of

law in this Court is that where a complaint contains two or more separate counts, one or more of which are substantially defective or insufficient, a general verdict based upon the entire complaint invades the substantial rights of a defendant and is erroneous. *Wilmington Star Mining Co.* v. *Fulton,* 205 U. S. 60, 77, 78.

The above and foregoing reasons relied upon for the allowance of a Writ of Certiorari are supported by the following summary and authorities.

Section 24 of the United States Judicial Code provides, among other things:

> "The District Courts shall have original jurisdiction as follows:
>
> "(1) of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000 and * * *
>
> "(c) is between citizens of a state and foreign states, citizens or subjects."

Article IV, Section 13 of the Illinois Constitution of 1870 provides, among other things:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed;"

The United States Circuit Court of Appeals erred in holding that the suits brought by the plaintiffs were of a civil nature within the meaning of the Judicial Code of the United States (28 U. S. C. A. Sec. 41).

Wisconsin v. *Pelican Ins. Co.,* 127 U. S. 265, 299, 32 L. Ed. 239, 246;

State of Iowa v. *Chicago, Burlington & Q. Rd. Co.*, 37 F. 497, 503, 3 L. R. A. 554, 559;

State of Indiana v. *Alleghany Oil Co.*, 85 F. 870, 873.

(a) Section 135 of the Illinois Dram Shop Act is a highly penal statute.

(1) The Statute.

Ch. 43, Sec. 135, Ill. Rev. Stats. 1939 (Sec. 135 is set forth in *haec verba* in the brief and argument).

(2) The principal purpose and object of Sec. 135 of the Dram Shop Act was to promote temperance in the consumption of alcoholic liquors by fostering and promoting sound and careful control and regulation of the manufacture, sale and distribution thereof and to punish those who in any form furnish means of intoxication by making them liable for a penalty in the form of damages which might arise through the acts of those persons whose intoxication was caused by such means.

The Title of the Illinois Dram Shop Act (Ch. 43, Ill. Rev. Stats. 1939, Secs. 94, 96, 97, 103, 108, 115, 118, 119, 120, 122, 124, 125, 126, 127, 127(a), 129, 131, 132, 133, 134, 136, 137, 138, 140, 141, 145, 146, 147, 151, 155, 156);

Hyba v. *C. A. Horneman, Inc.*, 302 Ill. App. 143, 147;

Bardon v. *Nudelman*, 369 Ill. 214, 216;

A. & P. Tea Co. v. *Mayor of Danville*, 367 Ill. 310, 313;

Black on "*Intoxicating Liquors*," (1892) p. 333;

Mead v. *Stratton*, 87 N. Y. 493, 496.

(3) In determining the scope and arriving at the true intent of the Statute the title of the Act as well as every other section of the Act should and must be considered, for the real object and purpose of the Legislature is to be gathered from an examination and comparison of the context of the whole Act.

Cruse v. *Aden,* 127 Ill. 231, 236-237.

(4) To rule that the actions brought by the plaintiffs herein are suits *to vindicate a private right* as was done by the United States Circuit Court of Appeals renders Section 135 of the Dram Shop Statute repugnant to Article IV, Section 13 of the Illinois Constitution in that the Statute as so construed has an independent subject which is incongruous, disconnected and without any natural relation to the object desired by the enactment of the whole *Alcoholic Liquor Control Act.*

Article IV, Sec. 13, Illinois Constitution of 1870;
Cruse v. *Aden,* 127 Ill. 231, 235-237;
Campe v. *Cermak,* 330 Ill. 463, 468;
The People v. *Horan,* 293 Ill. 314, 318-319;
The People v. *Clark,* 301 Ill. 428, 436.

(5) Whereas, if the Statute is construed to be penal it is constitutional. As so construed the private remedy given to the plaintiffs provided only the means by which the principal purpose and object of the statute may be accomplished; the damages sustained and recovered are incidental and are but the measurement of the amount of the penalty imposed upon the defendant for transgressions of the Statute.

Larned v. *Tiernan,* 110 Ill. 173, 178;
Stewart v. *Brady,* 300 Ill. 425, 432;
Raisor v. *C. & A. R. R. Co.,* 215 Ill. 47, 55;
Gaasden v. *Woodward,* 103 N. Y. 242, 243, 8 N. E. 653.

(6) The constitutionalty of Section 135 of the Illinois Dram Shop Act has been upheld as a valid exercise of the state police power.

O'Connor v. *Rathje*, 368 Ill. 83, 86;
Garrity v. *Eiger*, 272 Ill. 127, 134;
Bardon v. *Nudelman*, 369 Ill. 214, 216;
A. & P. Tea Co. v. *Mayor of Danville*, 367 Ill. 310, 312-315.

(7) But a valid exercise of the police power must have for its object the prevention of some offense of manifest evil or the preservation of the *public health, safety, morals or general welfare.*

A. & P. Tea Co. v. *Mayor of Danville*, 367 Ill. 310, 312-315;
Lawton v. *Steele*, 152 U. S. 133, 136, 38 L. Ed. 385, 388;
12 C. J. 929.

(8) Where a statute is susceptible of two constructions, one of which will render it unconstitutional and the other constitutional, that construction will be adopted which sustains the validity of the statute.

Cruse v. *Aden*, 127 Ill. 231, 236-237;
Italia America Shipping Corp. v. *Nelson*, 323 Ill. 427, 439;
Winter v. *Barrett*, 352 Ill. 441, 458.

(9) Under the Illinois law penal statutes are those by which punishments are imposed for transgressions thereof and it matters not by what mode the recovery is had,—whether by a criminal or civil procedure; nor the name given to the adopted means,—whether fine, penalty, forfeiture or *damages;* nor does it matter that the suit brought is in an individual plaintiff's name or that the suit is ex-

clusively under the control of the plaintiff or that the recovery inures to the exclusive benefit of the plaintiff.

Larned v. *Tiernan*, 110 Ill. 173, 175;
Raisor v. *C. & A. R. R. Co.*, 215 Ill. 47, 55;
Bell v. *Farwell*, 176 Ill. 489, 496;
Diversey v. *Smith*, 103 Ill. 378, 390;
Stewart v. *Brady*, 300 Ill. 425, 432;
The People v. *Hartford Life Ins. Co.*, 252 Ill. 398, 406;
Vestal Co. v. *Robertson*, 277 Ill. 425, 426;
Dabney v. *Manion*, 155 Ill. App. 238, 243;
Klages v. *Kohl*, 127 Ill. App. 70, 73.

(10) An action brought under Section 135 of the Dram Shop Statute, *although such action is civil in form*, is none the less an action to recover a penalty under a highly penal statute.

Emory v. *Addis*, 71 Ill. 273, 277;
Hall v. *Barnes*, 82 Ill. 228, 229;
Cruse v. *Aden*, 127 Ill. 231, 239.

(11) In Illinois a penal law may also be remedial and a statute may be remedial in one part and penal in another.

Bell v. *Farwell*, 176 Ill. 489, 496;
Diversey v. *Smith*, 103 Ill. 378, 390.

(b) The Federal Courts sitting in Illinois are bound to follow the State court decisions on substantive and State constitutional law that declares Section 135 of the Illinois Dram Shop Act penal.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188; 58 Sup. Ct. 817, 114 A. L. R. 1487;
Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, 496-498, 85 L. Ed. 1477, 1480;
Griffin v. *McCoach*, 313 U. S. 498-507, 85 L. Ed. 1481.

(1) Suits brought under the Judicial Code of the United States (28 U. S. C. A. 41) to recover a penalty under a State penal statute, *although civil in form*, are not suits of a civil nature.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265, 299, 32 L. Ed. 239, 246;

State of Iowa v. *Chicago, Burlington & Q. Rd. Co.*, 37 F. 497, 503, 3 L. R. A. 554, 559;

State of Indiana v. *Alleghany Oil Co.*, 85 F. 870, 873.

(2) Under Illinois law a *civil action in form* may be brought to recover a penalty provided by a penal statute and such suit may be brought in an individual plaintiff's name and be under the exclusive control of the plaintiff and the recovery may inure to the exclusive benefit of the plaintiff and the tests laid down in *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. Ed. 1123, have specifically been rejected and disapproved in Illinois.

Raisor v. *C. & A. R. R. Co.*, 215 Ill. 47, 55;

Grinestaff v. *New York Cen. R. R.*, 253 Ill. App. 589, 603;

Bell v. *Farwell*, 176 Ill. 489, 496;

Diversey v. *Smith*, 103 Ill. 378, 390;

Stewart v. *Brady*, 300 Ill. 425, 432;

Larned v. *Tiernan*, 110 Ill. 173, 175.

(3) The opinion of the United States Circuit Court of Appeals tends to foster the vice of non-uniformity of law that this court's decision in *Erie R. Co.* v. *Tompkins* sought to destroy, inasmuch as non-residents are accorded greater benefits than the resident litigants of Illinois.

Art. II, Sec. 10, Ill. Constitution 1870;

Robson v. *Doyle*, 191 Ill. 566, 570;

Rodisch v. *Koethe*, 178 Ill. App. 286, 288;
Diversey v. *Smith*, 103 Ill. 378;
Glasco v. *Fakes*, 143 Ill. App. 378, 380.

The United States Circuit Court of Appeals, Seventh Circuit, erred in sustaining the sufficiency of Counts I, IV, VII and X and Counts III, VI, IX and XII of the amended complaint and erred in holding that one good count would validate a general verdict.

(a) In order to create a liability under Section 135 of the Illinois Dram Shop Act the plaintiffs must prove that the intoxication of George Stout was the proximate cause of the injury to and death of Fred Cross, the husband and father.

Shugart v. *Egan*, 83 Ill. 56, 57;
Stecher v. *The People*, 217 Ill. 348, 349;
Sauter v. *Anderson*, 112 Ill. App. 580, 581-584;
McMahon v. *Sankey*, 133 Ill. 636, 640;
Hart v. *Duddelson*, 20 Ill. App. 618, 620.

(b) An injury to and death of a drunken person due to an assault by a third person who is not intoxicated is the intervening act of such third person and creates no liability upon a defendant under Section 135 of the Dram Shop Act.

Shugart v. *Egan*, 83 Ill. 56, 57;
Lueken, et al. v. *The People*, 3 Ill. App. 375, 376;
Schmidt v. *Mitchell*, 84 Ill. 195;
Tetzner v. *Naughton*, 12 Ill. App. 148, 153-154;
Campion v. *Chicago Landscape Co.*, 295 Ill. App. 225, 230;
Fent, et al. v. *Toledo, Peoria & W. Ry. Co.*, 59 Ill. 349, 351.

(c) Where a complaint contains two or more separate counts or causes of action, one or more of which are substantially de-

fective or insufficient and a motion to strike the defective or insufficient count or counts is overruled, a general verdict based upon the entire complaint is erroneous.

Wilmington Star Mining Co. v. *Fulton*, 205 U. S. 60, 77-78-79, 51 L. Ed. 708, 717;
Gompers v. *Buck Stove & R. Co.*, 221 U. S. 418, 439-440, 55 L. Ed. 797, 805;
Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402, 421, 62 L. Ed. 1186, 1196.

It is manifest from an examination of the above and foregoing pleadings, Constitution of Illinois, applicable authorities and the Statutes involved herein, that the actions at bar are brought to recover a penalty against this Petitioner and that consequently said actions are not suits of a "*civil nature*" within the meaning of Section 24 of the Judicial Code of the United States. It is also clear that the United States Circuit Court of Appeals for the Seventh Circuit has sanctioned a departure in pleading and practice that was highly prejudicial to the rights of the Petitioner in that irrelevant and immaterial issues were raised on which much evidence was heard which only tended to confuse and distract the jury.

WHEREFORE, your Petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket: Ione Cross, Ruby Cross, an Infant by Ione Cross, her next friend; Fredaline Cross, an Infant by Ione Cross, her next friend; and Fred Cross, an Infant by Ione Cross, his next friend, Plaintiffs-Appellees, *versus*

Phil Ryan, Defendant-Appellant, No. 7635, and that said judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

PHIL RYAN,
Petitioner

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